

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 13, 2004

STATE OF TENNESSEE v. WILLIAM H. MORRIS, JR.

Direct Appeal from the Circuit Court for DeKalb County
No. 02-011 Lille Ann Sells, Judge

No. M2003-03001-CCA-R3-CD - Filed October 28, 2004

The defendant, William H. Morris, Jr., challenges the revocation of his probation, specifically contending that: (1) the trial court was without jurisdiction to reinstate his sentence because his probationary period had expired, (2) the trial court abused its discretion in reinstating his previous sentence, and (3) the trial court erred in failing to grant the defendant's request for bond pending appeal. After careful review, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and DAVID H. WELLES, J., joined.

David N. Brady, District Public Defender, and John B. Nisbet, III, Assistant Public Defender, for the appellant, William H. Morris, Jr.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; William E. Gibson, District Attorney General; and William M. Locke, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In May 2002, the defendant pled guilty to driving on a revoked license, second offense. He was sentenced to eleven months, twenty-nine days, all suspended except forty-five days, and was placed on probation. In July 2002, the defendant tested positive for marijuana and admitted to his probation officer that he was using both marijuana and alcohol; a warrant for violation of probation was thereafter issued on these grounds. Following a hearing on the probation violation, the trial court ordered the defendant to serve fourteen days in jail and extended his probation six months, until November 8, 2003. Although the judge signed the order in March 2003, the original document was not filed with the clerk's office at that time. In June 2003, the defendant was arrested for, and pled guilty to, public intoxication; he was sentenced to thirty days on this charge. Again, in July 2003, a warrant for violation of probation was issued for failure to report, failure to pay court costs, failure to provide verification of employment, and for a new law violation. At the second probation violation hearing, the trial court discovered that

the previous order, extending the defendant's probation, had not yet been filed. Thereafter, the court obtained a copy of the order, found it to be true and exact, and entered the order into the record the same day. Further, upon finding the defendant to have repeated violations, the court revoked the defendant's probation and reinstated the previous sentence of eleven months, twenty-nine days.

The defendant objected to the reinstatement because, he contended, without the original order extending the probation on file, the court was without jurisdiction to reinstate the previous sentence due to the expiration of the probationary period. At the conclusion of the hearing, the defendant requested that bond be set pending the present appeal; however, the court denied the request. The defendant then filed a timely appeal to this Court.

Analysis

The defendant initially contends that the trial court's earlier order, extending his probation at the time of his first violation, is invalid because the original document was not filed with the clerk after being subscribed by the judge. Therefore, the defendant contends that his probationary period expired and the court was without jurisdiction to reinstate his sentence. We disagree. The defendant correctly states that Tennessee Code Annotated section 40-35-311(e) allows a trial judge to revoke probation "by order duly entered upon the minutes of the court." However, "an order is not divested of its vitality by a delay in its placement upon the minutes." State v. Howell, 1989 Tenn. Crim. App. LEXIS 99, at *9 (Tenn. Crim. App. Feb. 9, 1989), perm. app. denied (Tenn. 1989). Moreover, failure to file "does not invalidate the action taken on a certain date; 'the minute record, when prepared, is a record of the things done on the date shown by the record, and mere delay in preparing the record does not cause it to speak as of a later date.'" Id. (quoting Southern Continental Telephone Co. v. Alley, 72 S.W.2d 555, 556-57 (Tenn. 1934)). In the instant matter, the defendant does not refute that the judge did, in fact, revoke the defendant's probation at the hearing or that the document ultimately filed with the clerk was an exact copy of the original signed by the judge. Thus, the order reflecting the court's findings was entered upon the minutes, albeit delayed. Therefore, we hold that the order relates back to the date shown on the record and that the delay in filing does not invalidate the action taken by the trial court.

Next, the defendant contends that the trial court acted "arbitrarily and harshly" in ordering him to serve the balance of his original sentence. Upon finding by a preponderance of the evidence that the defendant has violated the terms of his probation, a trial court is authorized to order a defendant to serve the balance of his original sentence in confinement. See Tenn. Code Ann. §§ 40-35-310 and -311(d) (1997); State v. Harkens, 811 S.W.2d 79, 82 (Tenn. 1991). Furthermore, probation revocation rests in the sound discretion of the trial court and will not be overturned by this Court absent an abuse of that discretion. State v. Leach, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995). An abuse of discretion exists when "the record contains *no substantial evidence* to support the trial court's conclusion that a violation has occurred." State v. Conner, 919 S.W.2d 48, 50 (Tenn. Crim. App. 1995) (emphasis added).

In the case *sub judice*, the trial court noted that the defendant violated his probation on two separate occasions. In the first instance, the defendant tested positive for marijuana and admitted to his probation officer that he was using marijuana and alcohol. For this violation, the defendant received fourteen days in jail and a six-month extension of his probation. The court found that the defendant failed to take advantage of the court's leniency and again violated his probation when he was arrested for, and pled guilty to, public intoxication. The trial court had, "no hesitation [sic] whatsoever in finding, based on the proof, that the defendant has violated his probation and has no hesitation whatsoever in ordering him to serve the balance of this sentence in this case." We agree with the trial court and conclude there is ample evidence to support the trial court's findings.

Finally, the defendant contends that the court erred in failing to grant bond pending this appeal. Tenn. R. Crim. P. 32(g), by its specific language, squarely addresses this issue. It states in pertinent part: "Probation shall only be revoked after a hearing conducted according to law, and the judgment upon such a hearing is appealable by the losing party. The defendant *may* be released pursuant to applicable law pending such hearing and/or such appeal." Tenn. R. Crim. P. 32(g) (emphasis added). Thus, the plain language of the statute indicates that the defendant in the instant case was not entitled to bond as a matter of right. Moreover, the Attorney General of this state has opined that,

[T]he language of Tenn. R. Crim. P. 32(d) [deeming bail a matter of right] exhibits an intent to limit the misdemeanor's right to bail to those procedures arising as a direct result of criminal proceedings, i.e., direct appeals from conviction, denial of motion for new trial, or sentencing.

No Tennessee statutory or case law has established that a misdemeanor is entitled to bail pending such a hearing under Tenn. R. Crim. P. 32(d). Furthermore, the language of Rule 32 does not specifically grant the misdemeanor a right to bail pending a revocation hearing or appeal of revocation.

Op. Att'y Gen. No. 99-199,*2-3 (1999).

We are persuaded that the Attorney General is correct in this opinion. Therefore, the decision to grant bond pending an appeal of probation revocation lies with the sound discretion of the trial court.

In the present matter, the defendant knowingly disregarded the court's orders on multiple occasions and violated his probation twice. Because the language of Rule 32 does not grant a right to bond pending appeal of revocation of probation and because the defendant's history supports its findings, the trial court was well within its discretion in denying the appellant's request for bond pending this appeal, and this Court will not disturb that decision.

Conclusion

Based on the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOHN EVERETT WILLIAMS, JUDGE